

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, LOCAL UNION NO. 91
(COUNCIL OF UTILITY CONTRACTORS, INC.
AND VARIOUS OTHER EMPLOYERS)**

and

Case 3-CB-163940

FRANK S. MANTELL, An Individual

GENERAL COUNSEL'S REPLY BRIEF

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Counsel for the General Counsel (General Counsel), submits this brief in response to Respondent's opposition to the General Counsel's Cross-Exception.

In her cross-exception, the General Counsel excepted to the Administrative Law Judge's (ALJ's) failure to award reasonable consequential damages to the discriminatee, Frank S. Mantell. As the ALJ found that Mantell should be made whole for Respondent's unlawful actions, Mantell is entitled to consequential damages. Respondent opposes such damages because: (1) the ALJ should not have found Respondent violated the Act; (2) the ALJ abused his discretion in his evidentiary rulings; (3) Board precedent precludes such relief; (4) Mantell has another job as a firefighter; and, (5) Mantel had a duty to mitigate his damages. Not one of these reasons is a basis for refusing to award the relief requested at this stage of the proceeding.

Respondent's arguments that consequential damages are unwarned because there is no violation or due to the ALJ's evidentiary rulings are groundless. (R. Br. p. 10).¹ As found by the ALJ in his decision and detailed in the General Counsel's Answering Brief, Respondent violated the Act by removing Mantell from its out-of-work referral list due to his protected activity. Furthermore, as detailed in the Answering Brief, the ALJ is charged with regulating the course of the hearing and in doing so has significant discretion in controlling the hearing and directing the creation of the record. Turtle Bay Resorts, 355 NLRB 706 (2010) incorporated by reference 353 NLRB 1242 (2009); Parts Depot, Inc., 348 NLRB 152, 152 fn. 6 (2006). Accordingly, the Board will affirm an administrative law judge's evidentiary rulings absent an abuse of discretion. 300 Exhibit Services & Events, 356 NLRB 415, 415 fn. 1 (2010); Aladdin Gaming, LLC, 345 NLRB 585, 587 (2005). Here, the ALJ clearly did not abuse his discretion by directing the creation of the record.

Likewise Respondent's assertion that the Board's decision in The H.O.P.E. Program, 362 NLRB No. 128, slip op. at 2 fn. 1 (2015) precludes the award of consequential damages is inaccurate. Unlike the present case, in The H.O.P.E. Program, the issue of consequential damages was not fully briefed, which prevented its award. Here, there is no such barrier, as the issue is fully briefed.

Finally, the remaining issues raised by Respondent depend on consequential damages being awarded by the Board in this proceeding and afterword these issues would be addressed at a compliance proceeding. At the compliance stage, it will be determined whether Mantell suffered any consequential damages or mitigated his damages. See e.g., Emeryville Trucking,

¹ References to the ALJ's Decision shall be designated as ALJD __: __ showing the page number first followed by the line numbers; to the Respondent's Brief as R. Br. p. __; to the transcript as Tr. __; to the General Counsel's Exhibits as GC Exh. __; and to the Respondent's Exhibits as R. Exh. __.

285 NLRB 1066, 1068 fn. 10 (1987)(finding that issues regarding mitigation of backpay are to be raised in the compliance proceeding); see also, Intermet Stevensville, 350 NLRB 1270, 1275 fn. 21 (2007) (stating that respondent may offer evidence at compliance stage concerning mitigation of backpay).

While these issues are to be addressed in compliance, it should be noted that Mantell is not precluded from being awarded consequential damages because he holds two jobs. Under well-established Board precedent, a discriminatee is not denied backpay because he works two jobs. The Board consistently holds that the earnings of a second job that the discriminatee held before the unlawful action and continued to hold through the backpay period are not considered interim earnings and are not deducted from gross back pay. Calson Tower Geriatric Center, 281 NLRB 399 (1986); see also, Acme Mattress Co. Inc., 97 NLRB 1439, 1443 (1952); Isaac and Vinson Security Services, 208 NLRB 47, 50, 51 (1973); U.S. Telefactores Corp., 300 NLRB 720, 722 (1990). Accordingly, there is no basis to deny Mantell consequential damages because of his employment. Both before and after Respondent's unlawful actions, Mantell worked as a firefighter and a laborer. (ALJD 2:fn 1, Tr. 79). Thus, under Board precedent Mantell's job as a firefighter would not be considered interim earnings and would therefore not be deducted from his award.

Based on the foregoing, General Counsel respectfully requests that the Board award Mantell consequential damages.

DATED at Buffalo, New York this 16th day of November 2016.

Respectfully submitted,

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STATEMENT OF SERVICE

I HEREBY CERTIFY THAT on November 16, 2016, the following document was electronically filed with the National Labor Relations Board and copies were served on the following parties by electronic mail:

General Counsel's Reply Brief

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Dated at Buffalo, New York this 16th day of November 2016.

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